IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

RSA.No. 961 of 2006()

AS.201/2003 of DISTRICT COURT,THIRUVANANTHAPURAM
OS.65/1999 of PRL.M.C.,THIRUVANANTHAPURAM.

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APPELLANTS: APPELLANTS/PLAINTIFFS

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1. SAIVA VELLALA SANGHOM,
   REG. NO. 47/1975, THIRUVANANTHAPURAM,
   REP. BY ITS PRESIDENT K.RAVINDARN,
   T.C.28/2493, SARANALAYA, OLD SREEKANTESWARAM ROAD,
   CHETTIKULANGARA, THIRUVANANTHAPURAM.

2. V.S.PERUMAL PILLAI,
   S/O.VADIVEL MURUGAN PILLAI, SECRETARY,
   SAIVA VELLALA SANGHOM, REG. NO. 47/1975,
   RESIDING AT T.C.11/2132, KANAKA NAGAR,
   VELLAYAMBALAM, KOWDIAR, THIRUVANANTHAPURAM.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENTS/RESPONDENTS/ DEFENDANTS

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1. OMANA PARAMESWARAN PILLAI,
   W/O.LATE PARAMESWARAN PILLAI,
   T.C.24/1349, 138 BAPUJINAGAR,
   THYCAUD P.O., THIRUVANANTHAPURAM.

2. RAJAN, S/O.PARAMESWARAN PILLAI,
   DO. DO.

3. MURALEEDHARAN NAIR,
   SON-IN-LAW OF OMANA PARAMESWARAN PILLAI,
   DO. DO.

4. THE SECRETARY,
   CORPORATION OF THIRUVANANTHAPURAM,
   CORPORATION OFFICE, THIRUVANANTHAPURAM.

5. RAJESWARI, D/O.OMANA,
BAPUJI NAGAR-138, THYCAUD,
THIRUVANANTHAPURAM.

6. JAYASREE, D/O.OMANA,
DO. DO.

BY ADV. SRI.N.NANDAKUMARA MENON,SC,TVM CORPN.FOR R4

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 04/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 961 OF 2006

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Dated this the 4th day of December, 2007

JUDGMENT

Plaintiffs in O.S.65/1999 on the file of Munsiff Court, Thiruvananthapuram are the appellants. Defendants are the respondents. Appellants instituted the suit seeking a decree for permanent prohibitory injunction restraining respondents from making any construction over plaint C schedule compound wall or making any consturction in the property so as to touch plaint C schedule compound wall. They also sought a mandatory injunction directing respondents to remove the illegal construction made over the plaint C schedule compound wall or touching the same. Fourth respondent is the Secretary, Corportion of Thiruvananthapuram and respondents 1 to 3 and others are party defendants. No relief as against fourth respondent Corportion was sought and Corporation was impleaded on the contention

that Corporation is bound to take action for violation of the Building Rules by other respondents. Respondents 1 to 3, 5 and 6 remained absent and were set ex parte.

2. Learned Munsiff on the evidence of PW1, Exts.A1 and A2, C1 and C2(a) granted an ex parte decree. As per the judgment and decree, respondents are restrained from making any construction touching plaint C shcedule property. Learned Munsiff omitted to take note of the relief of mandatory injunction sought for. It was neither considered nor rejected. Appellants failed to take note of non-granting of the mandatory portion of the decree. Later finding the omission they filed A.S.201/2003 before District Court, Thiruvananthapuram after the period of limitation along with I.A.2682/2003, an application filed under section 5 of the Limitation Act. Appellants contended that the delay was not caused due to wilfil negligence, but as the clerk of the advocate omitted to take copy of the decree and

judgment in time and only later it was known that relief of mandatory injunction was not granted. Before first appellate court also only the fourth respondent Corporation appeared and other respondents remained absent. Learned District Judge, though found that counsel had filed an affidavit stating that he did not file copy application in time, was not prepared to accept the affidavit filed on behalf of appellants and dismissed the application. Consequently appeal was dismissed as barred by limitation. Second appeal is filed challenging the said judgment.

3. When the appeal came up for admission on 10.1.2007 notice before admission was ordered to all the respodents. Except fourth respondent Corportion, other respondents did not appear before this court also.

4. Learned counsel appearing for appellant and fourth respondent were heard.

5. The following substantial question of law is formulated.

Whether first appellate court was justified in dismissing the petition filed under section 5 of Limitation Act when delay was not wilful or due to any negligence.

6. The judgment of learned Munsiff shows that Munsiff considered the suit only as one for prohibitory injunction. Evidently relief of mandatory injunction sought for was omitted to be taken note of. Consequently it was not considered and the relief was not granted. When the omission was taken note of by appellants, they filed the appeal though belated. They have filed an affidavit explaining the delay. Even the counsel who was appearing for appellants owned up the mistake and filed an affidavit. In such circumstance, first appellate court was not justified in mechanically dismissing the application, when facts revealed show that trial court omitted to take note of the relief pleaded

eventhough defendants were set ex parte and evidence was adduced to prove the claim. In such circumstance, order of the learned District Judge in I.A.2682/2003 is set aside.

Appeal allowed. Impugned judgment in A.S.201/2003 set aside. A.S.201/2003 is restored to file and remanded to the District Court, Thiruvananthapuram for disposal in accordance with law.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006